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No. 76-699

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE AMERICAN PARTY OF IDAHO,
JOHN MCADAMS,
individually and as chairman of
THE AMERICAN PARTY OF IDAHO,
APPELLANTS

v.

CECIL ANDRUS,
Chairman of the State Board of Examiners, and the
State Board of Examiners;
DENNISON C. AMBROSS,
Director of the Corporation Department of
Revenue and Taxation;
JOE R. WILLIAMS,
Idaho State Auditor;
PETE T. CENARRUSA,
Secretary of the State of Idaho; and
MARJORIE MOON,
Treasurer of the State of Idaho,
APPELLEES

IDAHO STATE DEMOCRATIC PARTY,
INTERVENORS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

MOTION TO DISMISS OR AFFIRM BY APPELLEES

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MOTION TO DISMISS OR AFFIRM BY APPELLEES

The Appellees in the above-entitled case, pursuant to Rule 16 of the Rules of the Supreme Court of the United States,

move to dismiss or affirm the Order Granting Defendants' Motion for Summary Judgment of the District Court below on the grounds that the Court below lacked subject matter jurisdiction over the claims advanced Appellants and that the question presented is so insubstantial as to not need further argument.

STATEMENT

This is a direct appeal from an Order Granting Defendants' Motion for Summary Judgment entered on the 19th day of August, 1976, by a District Court constituted of three judges specially constituted pursuant to 28 U.S.C. §§2281 and 2284 to hear Appellants' attack on the constitutionality of a State of Idaho statute which provided for a certain type of financing distribution for political parties in the State of Idaho.

SUMMARY OF ARGUMENT

1. Appellants, in their Complaint below, brought this action in behalf of the American Party of Idaho, an unincorporated political party consisting of an association of individuals, and John McAdams, individually, and as Chairman of said political party. Jurisdiction of the United States courts was alleged under 28 U.S.C. §1331, federal question jurisdiction, and 28 U.S.C. §1343, as the same relates to jurisdiction for actions cognizable under the Civil Rights Act of 1871 [42 U.S.C. §1983]. Appellees, Defendants below, challenged Appellants' assertion of federal question jurisdiction claiming that it was not possible for them to meet the $10,000.00 amount in controversy requirement of 28 U.S.C. §1331, and also challenged civil rights act jurisdiction on the grounds that the American Party of Idaho, not being a corporation or styled as a class action, was not a "person" under the purview of 42 U.S.C. §1983 or its corresponding jurisdictional statute 28 U.S.C. §1343. Further, Appellees challenged the standing

of individual Appellant John McAdams to maintain the action on either jurisdictional ground advanced due, again, to the lack of amount in controversy and lack of any allegation in Appellants' (Plaintiffs') Complaint of any individual, personal, injury to Plaintiff McAdams. Though the District Court below did "find" jurisdiction of the case, the Court refused to state upon what jurisdictional statute they based their order granting jurisdiction. Appellees maintain that, under the facts and jurisdictional statutes alleged in the Complaint below, the District Court was absolutely without subject matter jurisdiction and should have dismissed the Complaint.

2. Even assuming that the District Court was correct in finding jurisdiction and hearing the merits of the case on summary judgment motion, the conclusion of the Court so clearly spelled out that the challenged statutory subsection of the Idaho Code relating to distribution of "undesignated" campaign finance monies raised through a state check-off system built into the Idaho tax return forms was not a denial of equal protection of the laws that it would be a waste of this Court's time to relitigate an issue decided below upon well settled principles of constitutional law. Appellants sole challenge to the distribution scheme was that the same violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Since the scheme did not fall within any of the traditional suspect categories which require a court to apply the "strict judicial scrutiny" or "compelling state interest" tests for equal protection challenges, and since the scheme certainly comported with the decisions of this Court relating to the "rational basis" test, it was quite proper for the Court below to conclude that the *Buckley v. Valeo*, 424 U.S. 1 (1976), and *American Party of Texas v. White*, 415 U.S. 767 (1974), cases were dispositive of the contentions raised by Appellants, and that Appellants were entitled to summary judgment as a matter of law.

ARGUMENT

I. FEDERAL COURTS MAY NOT ASSERT FEDERAL QUESTION JURISDICTION OVER CASES BROUGHT BEFORE THEM UNLESS SUCH CASES DEMONSTRATE AN ACTUAL AMOUNT IN CONTROVERSY IN EXCESS OF $10,000.00

In their Complaint herein, Plaintiffs sought to invoke the jurisdiction of the United States District Court pursuant to 28 U.S.C. §1331 relating to federal questions. Under this statute a plaintiff must pass a two-step threshold test to meet jurisdictional requirements. First, a plaintiff must present to the Court a matter in controversy which "arises under the Constitution, laws, or treaties of the United States." The second requirement is that "the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs." Though Plaintiffs baldly alleged in their Complaint that this instant controversy is cognizable under the Fourteenth Amendment to the United States Constitution, involving a denial of equal protection of the laws, Plaintiffs cannot and do not meet the second part of the jurisdictional "test" in that they do not present a matter in controversy which exceeds the sum or value of $10,000. Defendants submit that there is no method of computation of monies to which Plaintiffs might be entitled by distribution of the political party contributions in dispute herein which would rise to the over-$10,000 level. Taking the figures supplied by Plaintiffs in Exhibit "C" to their Complaint, the following "amounts in controversy" may be computed:

Average American Party Vote	14,882	=	x	$ to Am. Party
Average Democrat Party Vote	145,551		18,664	$ to Dem. Party

x = $1,908.31

High American Party Vote	31,560	+	x	$ to Am. Party
High Democrat Party Vote	184,182	=	18,664	$ to Dem. Party

x = $3,198.13

High American Party Vote	31,570	=	x	$ to Am. Party
Avg. Democrat Party Vote	145,551		18,664	$ to Dem. Party

x = $4,048.22

Thus, under no possible method of computing what the American Party *might* have received as "designated" monies through the Idaho tax checkoff procedure, based on the performance of the American Party at the polls in the 1974 Idaho General Election, could said political party come close to meeting an "over-$10,000" amount in controversy claim. This contention holds true even when the amount of funds to which the American Party would be entitled through distribution of "undesignated" funds (the sum of $1,358.15) is added to the potential "designated" funds amounts.

Reaffirmation of the requirement that there be a $10,000 amount in controversy for federal question jurisdiction was made by this Court as recently as 1972. *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). As constitutional scholar Charles Alan Wright has noted, it is unfortunate that this monetary requirement for assertion of federal question jurisdiction exists, especially in cases where a federal forum seems most appropriate or where none but a federal forum would allow pursuit of the proposed litigation. 13 FEDERAL PRACTICE AND PROCEDURE, *Federal Question Jurisdiction* §3561, pp. 392-393 (Wright, Miller and Cooper ed., West 1975). However, the text writers note:

> This situation has aroused some commentators and led them to urge the courts to cure the gap on their own. A few courts have responded to this invitation, either by taking a very relaxed view of what must be shown to satisfy the statutory requirement, or by questioning the constitutionality of the amount requirement as applied to these cases, or by announcing that constitutional rights are worth more than $10,000. Fortunately the great majority of courts have resisted this temptation and have declined the invitation to invent jurisdiction for themselves that Congress has not yet seen fit to grant. Congress ought to amend Section 1331 by deleting the amount in controversy requirement, but until it does the courts must apply the statute as it exists and has histori-

cally been construed. [Footnotes omitted.] *Id.* at pages 394-396.

Though the Congress recently passed Public Law 94-574 [90 Stat. 2721 (1976)] which removed the $10,000 amount in controversy requirement for actions against the United States, such dollar amount requirement remains for all other federal question cases. S. 800, which ultimately became Public Law 94-574, as originally considered would have removed the $10,000 amount in controversy requirement for *all* federal question cases brought under §1331; the bill as passed reflects a continuing Congressional intent that the jurisdictional amount is necessary for federal question jurisdiction in all cases except those which are brought against the United States and officers or entities thereof. See also the excellent discussion of amount in controversy requirement of §1331 by Judge Donald Russell in *McGaw v. Farrow,* 472 F.2d 952, 955 (4th Cir. 1973).

The United States Court of Appeals for the Ninth Circuit has ruled that if a defendant challenges a plaintiff's allegation of a $10,000 amount in controversy that the plaintiff has then the burden of asserting specific facts which will justify the $10,000 jurisdictional amount. *Rincon Band of Mission Indians v. County of San Diego,* 495 F.2d 1, 8 (9th Cir. 1974), *cert. denied* 419 U.S. 1008. Defendants herein did make such a challenge. Though certain federal District Courts within the Ninth Circuit had often rejected the traditional interpretation of the requisite jurisdictional amount in controversy of over $10,000, recent appellate court decisions have reiterated the *need* to meet that requirement. *Bowers v. Campbell,* 505 F.2d 1155 (9th Cir. 1074) [claim of racial discrimination in military personnel practices by former civilian employee]; *Ybarra v. Town Los Altos Hills,* 503 F.2d 250, 253 (9th Cir. 1974) [zoning ordinance]; *Rincon Band of Mission Indians v. County of San Diego, supra,* 495 F.2d at pages 6-8 [raising the issue of jurisdictional amount *sua sponte* in a case involving

a conflict of federal Indian law and a county building code]. Defendants submit that the Court below failed to exercise the necessary judicial scrutiny into jurisdictional amount, and wrongfully ruled that jurisdiction existed in this case.

II. AN "AFFILIATION OF ELECTORS REPRESENTING A POLITICAL GROUP" IS NOT A "PERSON" WITHIN THE MEANING OF THE CIVIL RIGHTS ACT OF 1871.

The Civil Rights Act of 1871 [42 U.S.C §1983] provides redress whenever a person "subjects, or causes to be subjected, any citizen ... or other person" to a deprivation of federally created civil rights to which they are entitled. It is clear from the allegations of Plaintiffs' Complaint that John McAdams, the individual Plaintiff named therein, is considered merely in a representative capacity as head of the Plaintiff political party and although on the Complaint "individually" has alleged no individual wrong to himself as a person. By virtue of Paragraph II, 2, at page 1 of said Complaint, the Plaintiff American Party of Idaho is styled as "affiliation of electors representing a political group." Defendants submit that such an organization is not a "citizen" or "person" within the ambit of protections afforded by the Civil Rights Act of 1871. Though this Court specifically ruled that labor unions *may* sue under §1983 as "persons" deprived of rights secured by the Constitution and laws, in *Allee v. Medrano,* 416 U.S. 802 (1974), it should be noted that that case was brought as a class action, as opposed to the instant case which is brought merely in the name of the political organization with the addition of a named individual who alleges no wrong to himself as an individual. See *Allee, supra,* fn. 13, 416 U.S. at page 819. At any rate the *Allee* case is distinguishable, as are other cases in which this Court has granted standing to certain labor or welfare rights organizations, in that:

The statements in those opinions that the organi-

> zation has standing to assert the rights of its members were made in the context of a claim of abridgment of the constitutional right of association; indeed, in all but the last case [*N.A.A.C.P. v Button,* 317 U.S. 415, 428-429 (1963)], the right to refrain from disclosure of membership because of the adverse effect of disclosure on both the association and the members was the very point at issue. ... While the Court said in Sierra Club v. Morton, *supra,* 405 U.S.at 739, 92 S.Ct. at 1368, "[i]t is clear that an organization whose members are injured may represent those members in a proceeding for judicial review," [followed by a citation to *Button*] we think this must be limited to the issue there *sub judice,* standing to seek review of the action of federal officers, and not as broadening the standing of organizations as plaintiffs under the Civil Rights Act. *Aguayo v. Richardson,* 473 F.2d 1090, 1100 (2d Cir. 1973), *stay denied* 410 U.S. 921, *cert. denied* 414 U.S. 1146.

When one is deprived of his civil rights the injury is to his person and he is the only one who has standing to sue under §1983. *Krum v. Sheppard,* 255 F. Supp. 994 (W. D. Mich. 1966), *aff'd.* 407 F.2d 490 (6th Cir. 1967). It has also been held that an organization of women did not have standing to speak for its members in a civil rights case. *Nat'l Organization for Women - New York Chapter v. Goodman,* 374 F.Supp. 247 (S.D. N.Y. 1874). It has further been held that an association organized to eliminate racial discrimination had no standing in and of itself to bring an action under §1983. *Louis v. Pennsylvania Indus. Development Authority,* 371 F.Supp. 877 (E.D. Pa. 1974), *aff'd* 505 F.2d 730 (3rd Cir. 1974). Defendants submit that these cases represent a proper application of the law. Just as in the above cases, Plaintiff American Party of Idaho has no standing as a "person" to maintain this action under 42 U.S.C. §1983, nor should that statute be expanded by judicial interpretation beyond its plain reference to "persons" and "citizens" when an organization such as the political party herein, has ample

opportunity to attempt otherwise to allege injury to individual members ("persons") singly or through class action.

III. PLAINTIFF JOHN McADAMS HAS NO STANDING TO MAINTAIN THIS ACTION.

Defendants further submit that Plaintiff John McAdams has no standing to maintain this action since, though he certainly is a "person" within the meaning of the Civil Rights Act of 1871 [42 U.S.C. §1983], he suffers no alleged wrong as an individual under the facts of Plaintiffs' Complaint due to the fact that the remaining state statutory subsection under contention herein relates solely to distribution of funds to political parties — a situation in which no individual is "wronged." Moreover, said Plaintiff appears in the action as an individual solely in his capacity as the Chairman of the American Party of Idaho which, as an association and not a "person," has no standing itself. [Complaint, ¶II, 2, at p. 1]

IV. THE CIVIL RIGHTS ACT OF 1871 PROVIDES RELIEF FOR WRONGS WHICH HAVE ALREADY OCCURRED, BUT MAY NOT BE USED TO ENJOIN AN ANTICIPATED WRONG WHERE THERE IS NO HISTORICAL PROOF THAT THE ANTICIPATED WRONG WILL CAUSE THE ALLEGED ANTICIPATED HARM.

Plaintiffs sought to enjoin action under a state statutory subsection which had never before been utilized. Since 1976 was the first year in which action could be taken under the state statutory subsection there was no history of action thereunder which *had* harmed the Plaintiffs herein. What Plaintiffs sought was that the court below should enjoin a "probable" or "likely" course of action which, they alleged, would work to their detriment. The Civil Rights Act of 1871, however, is designed to provide relief *only* for action which *does* "subject" or "cause to be subjected" some person to the deprivation of constitutionally guaranteed rights. Since

nothing had yet happened and since there was no past history of an occurrence under the challenged statutory subsection, no harm for which redress might be had at the time of filing their Complaint occurred to these Plaintiffs. The absence of an allegation of present wrong prevented the court from enjoining future alleged wrongs. *Manion v. Holzman,* 379 F.2d 843 (7th Cir. 1967), *cert. denied* 389 U.S. 976. A mere intention to take some action at some time in the future which, if it occurred, might present a situation within the purview of 42 U.S.C. §1983 does not, before the occurrence, present a justiciable question under the Civil Rights Act of 1871. *Progress Development Corp. v. Mitchell,* 182 F.Supp. 681 (E.D. Ill. 1960), *aff'd in part, rev'd in part, on other grounds* 286 F.2d 222 (7th Cir. 1961).

V. THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT REQUIRE ABSOLUTE EQUALITY OR PRECISELY EQUAL ADVANTAGES.

This court noted in *Norvell v. State of Illinois,* 313 U.S. 420 (1963), *reh. denied,* 375 U.S. 870, that:

> Exact equality is no prerequisite of the equal protection of the laws within the meaning of the Fourteenth Amendment. [Citations omitted.]
>
> "... the Fourteenth Amendment enjoins 'the equal protection of the laws' and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." 373 U.S. at pp. 423-424.

In *Kotch v. Board of River Port Pilot Com'rs for Port of New Orleans,* 330 U.S. 552 (1947), *reh. denied* 331 U.S. 864, this Court held:

> A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment. 330 U.S. at p. 556.

As stated by Justice Stewart, concurring in the decision in *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1 (1973) *reh. denied* 411 U.S. 959:

> Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties. The function of the Equal Protection Clause, rather, is simply to measure the validity of *classifications* created by state laws.
>
> There is hardly a law on the books that does not affect some people differently from others. But the basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes. In with respect to such legislation, it has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory — only by classifications that are wholly arbitrary or capricious. [Citation omitted]. This settled principle of constitutional law was compendiously stated in Mr. Chief Justice Warren's opinion for the Court in *McGowan v. Maryland,* [citation omitted], in the following words:
>
> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." 411 U.S. at pp. 59-61.

And, as ruled in *Robinson v. Board of Regents of Eastern Kentucky University,* 475 F.2d 707, 710 (6th Cir. 1973): "The equal protection clause does not require identical treatment

for all people. The states retain, under the Fourteenth Amendment, the power to treat different classes of people in different ways." See also, *Ross v. Moffitt*, 417 U.S. 600 (1974); *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Tucker v. Hardin*, 430 F.2d 737 (1st Cir. 1970).

VI. A CASE INVOLVING FINANCING OF POLITICAL PARTIES AND A CHARGE OF DENIAL OF EQUAL PROTECTION OF THE LAWS IS TO BE ANALYZED UNDER THE "RATIONAL BASIS" TEST, AS OPPOSED TO THE "STRICT JUDICIAL SCRUTINY" OR "COMPELLING STATE INTEREST" TESTS.

Recently this Court had occasion to consider exhaustively the applicability of the "compelling state interest" or "strict judicial scrutiny" tests as applied to questions submitted on equal protection grounds, in *San Antonio School District v. Rodreguez*, 411 U.S. 1, 28 (1963), and stated:

> However described, it is clear that appellees' suit asks this Court to extend its most exacting scrutiny to a system that allegedly discriminates against a large, diverse, and amorphous class, ***. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities or subjected to a history of such purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

In *Rodriguez* the appellees contended that there was an inextricable nexus between education (not among the rights afforded explicit protection under the United States Constitution) and the constitutionally protected right of First Amendment freedom as well as the intelligent utilization of the protected right to vote. The argument was that the effective utilization of these fundamental constitutional rights was dependant upon a person's ability to "read, assimilate, and utilize available knowledge." [411 U.S. at p. 35.] This

Court further stated:

> A similar line of reasoning is pursued with respect to the right to vote. Exercise of the franchise, it is contended, cannot be divorced from the educational foundation of the voter. The electoral process, if reality is to conform to the democratic ideal, depends upon an informed electorate: a voter cannot cast his vote intelligently unless his reading skills and thought processes have been adequately developed.
>
> We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and vote. Yet we have never presumed to possess either the ability or authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice. [Emphasis in original.] That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities. 411 U.S. at pp. 35-36.

An apt analogy may be made to the situation in the case at bar. Involved herein is *not* the constitutionally protected right to vote, but, instead, the unprotected situation of state involvement in a scheme to distribute financial support to political parties. In no way does this financing scheme directly involve or affect the fundamental right to exercise the voting franchise. Yet, as in the situation of financing education, the state scheme *indirectly* relates to a constitutionally guaranteed right — the right to vote. Defendants submit, however, that just as there is no guarantee to the citizenry of the most *informed* electoral choice, there is no guarantee to the citizenry that the state shall somehow assist in the financing (directly or indirectly) of the electoral process. Undoubtedly, a cogent, appealing argument can be made regarding inability to inform the electorate adequately of

political philosophy and political candidates if a political party is underfunded — with or without state participation in the political party financing process. However appealing such an argument may be, there is no way that the underlying foundation — financing of the political process — *can* rise to the level of a right which is guaranteed by our federal Constitution. The political party financing methods in any state, by any means that is not manifestly unfair under "rational basis" standards, does not warrant judicial intrusion into legitimate state activities. There can be no doubt that the financing scheme herein, which takes monies which otherwise would go into the General Fund of the State of Idaho and allows those funds so designated by taxpayers to be distributed by the State to political parties, *is* a "revenue and taxation" measure. This Court again recognized its role in assessing such laws in *Rodriguez* by holding:

> We need not rest our decision, however, solely on the inappropriateness of the strict-scrutiny test. A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes. ... We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. ... ... [A]ppellees would have the Court intrude in an area in which it has traditionally differed to state legislatures. This court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause: [directly quoting at length from *Madden v. Kentucky,* 309 U.S. 83, 87-88 (1940); additional citations omitted.]
>
> Thus, we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising *and disposition* of public revenues. [Emphasis supplied.] Yet, we are urged to

> direct the States either to alter drastically or to throw out the property tax altogether in favor of some other form of taxation. No scheme of taxation, whether the tax is imposed upon property, income, or purchase of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause. 411 U.S. at pp. 40-42.

Just as the Court has moved cautiously in the area of state action "with the respect to the raising and distribution of public revenues," so should it respect the right and ability of the State of Idaho to carve out for its populous an adequate, rational formula for collection and distribution of revenues designed to assist in the financing of the political party process. As further recognized in *Rodriguez:* "The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest." [411 U.S. at p. 55.]

And what of the classifications created in the case at bar? Though the statutory scheme speaks in terms of "major" and "minor" political parties, and the like, the distribution of "undesignated" funds which remains in controversy herein goes to *all* political parties, with a ceiling amount of fifty percent of the fund limited to any one political party, regardless of the percentage of support that party's gubernatorial candidate received at the last general election. Such a "ceiling," while acting as a detriment to the political party with over-fifty percent of the gubernatorial vote (such as the Democrats in 1974, with approximately 73% of such vote), inures to the benefit to "smaller" or "minor" political parties which stand to pick up a proportioned bonus from the redistribution of the over-fifty percent amount. The entire amount of ninety percent of the "undesignated" fund monies is distributed to all political parties according to the percen-

tage of the gubernatorial vote their candidate received at the last general election for that office (together with the apportioned over-fifty percent distribution). Such a method of distribution comports with the expressed attitudes of the Idaho electorate of support for that particular party and its candidate. Idaho has chosen to distribute ten percent of the "designated" fund monies on an across-the-board equal apportionment basis, thus recognizing that there is a threshold interest in the state in having *some* funding for each and every political party regardless of its demonstrated popular support. While it seems plausable to accept this threshold support rationale for the small 10% portion of the checkoff fund monies "undesignated" for any political party, it would be manifestly unfair for "major" parties to have such a straight-line distribution made of the entire amount of "undesignated" fund monies inasmuch as such a distribution would not at all reflect the expressed nature of electorate support for the various political parties as evidenced by popular vote. An across-the-board, straight-line, distribution of all "undesignated" fund monies which create a discrimination against the "major" political parties in favor of the "minor" political parties which would be entirely out of proportion to voter sentiment and support of the various political parties. Defendants submit that the State of Idaho has chosen a manifestly "rational basis" for distribution for the "undesignated" fund monies. Concurring in the majority opinion of *Rodriguez,* Mr. Justice Stewart reminded: There is hardly a law on the books that does not affect some people differently than others." [411 U.S. at p. 60.] Yet, as Mr. Justice Stewart further noted, only classifications that are wholly arbitrary or capricious fall under the application of Equal Protection Clause sanctions. [*Ibid.*] Defendants grant that the challenged statutory subsection's effect affects some political parties differently than others. Yet, such differences do not rise to the level of being "wholly arbitrary or

capricious" and are sufficiently set forth to provide *effective* equality so as to meet a judicial "rational basis" test.

VII. THE CAMPAIGN FINANCING LAWS APPROVED BY THE UNITED STATES SUPREME COURT IN SEVERAL CASES PROVIDE FOR LESS "EQUALITY" OF FUNDING AND DISTRIBUTION OF MONIES THAN DO THE IDAHO LAWS RELATING TO SUCH FUNDING AND DISTRIBUTION.

The case of *Buckley v. Valeo,* 424 U.S. 1 (1976), through its validation of the Presidential Primary Matching Account and other specific language, has unquestionably upheld the principle of keying the distribution of public funds to candidates or parties based on the public support which they enjoyed. The case of *American Party of Texas v. White,* 415 U.S. 767 (1974), has also recently upheld this principle. This funding principle is also directly analogous to the indirect public financing of political parties and candidates provided by tax credits and deductions. Furthermore, plaintiffs have not suggested any system which would function in a more equitable fashion than already exists under Idaho law. In *Buckley,* in upholding public financing, this court said, in part:

> ... Congress was legislating for the "general welfare" — to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fund raising. [424 U.S. at p. 91.]

In *American Party of Texas v. White,* several minor parties sought positions for a slate of candidates on the general election ballot. Under Texas law, minor parties could achieve ballot positions *only* through party conventions or a petition process, while the major parties used *solely* a primary system. Texas provided for public financing from state revenues for primary elections only for those political parties casting 200,000 or more votes for governor in the last

proceeding general election. The law precluded public funding to minor political parties to reimburse them for their costs in obtaining ballot position. Thus, no financing by the State of Texas was provided for any nominating method *except* that of the primary elections, which primary elections are required of those political parties which fielded a gubernatorial candidate at the last election for that office who received more than twenty percent of the total votes cast for the office of governor. Obviously, the primary election requirement in Texas affects only "major" political parties. Those political parties with no gubernatorial candidate, or whose gubernatorial candidate received twenty percent or less than the total vote for the office of governor, *must* nominate their candidates by convention, and no state financing whatsoever is provided for conventions or nominations provided thereby, nor is state financing available for any nonpartisan or independent candidates who qualify for inclusion on the official ballot. Yet, "major" political parties *are* entitled to receive three-forths of their allowable expenses for the conduct of their required primary election. This court considered the Texas financing procedure and upheld the same in its decision in *American Party of Texas v. White,* 415 U.S. 767, 791-795 (1974), in which it noted that the Texas system did not have a "real and appreciable impact upon the exercise of the franchise." [Id. at 792-794.]

Turning, next, to the applicable Idaho law now in controversy, relating to distribution of "undesignated" monies credited to the election campaign fund [§34-2503 (b), *Idaho Code;* 1975 Idaho Session Laws, ch 132, §4(b)], the formula provided therein must be scrutinized in light of what this Court has endorsed in both the *Buckely v. Valeo* and *American Party of Texas* cases. Subsection (b) provides that ten percent (10%) of all "undesignated" monies, together with any undistributed aportions of the entire election campaign fund, shall "be distributed in equal portions to all

major, minor and new political parties which have qualified candidates for elective state office for the ballot in the next general election." Obviously, this distribution scheme contains an absolute "equality" for all parties. The remaining ninety percent (90%) of "undesignated" monies are distributed according to a formula which allows a single political party to receive no more than fifty percent of such fund. Thus, relating that portion of the distribution scheme to the facts of the last Idaho general election where the candidate of the Democratic Party received approximately 73 percent of the total vote cast, it is obvious that the Democratic Party "suffers" from the fifty percent ceiling on distribution of "undesignated monies," while the American Party benefits therefrom. The Democratic Party has not complained that this formula is in any way inequitable. The American Party, suffering no loss (and, actually, receiving a gain) from the formula, has no standing to complain that it is in some way short-changed by the fifty percent ceiling. In all other respects, distribution of the "undesignated" monies is accomplished "in proportion to the share of the votes cast for the candidate of the party for the office of governor in the last election for governor." [§34-2503(b), *Idaho Code.*] Thus, distribution of the majority of the "undesignated" fund monies is made in direct proportion to the interest demonstrated by Idaho voters in the political party to which money is distributed as evidenced by popular vote of the Idaho voters for that political party's candidate for governor. A party with no gubernatorial candidate will, of course, receive only the money from the equally apportioned ten percent of undesignated funds rather than any portion of the ninety percent of the fund monies. But, this method of "keying" distribution of funds to the popular vote for the office of governor was precisely the method of "keying" distribution funds which was approved by this Court in the *Buckley v. Valeo* and

American Party of Texas cases. Moreover, it is submitted that Idaho's scheme for distribution of "undesignated monies" is inherently more fair and equitable than that employed by Texas inasmuch as all Idaho political parties (regardless of whether they are categorized as "major" or "minor") share in such distributional scheme. "Minor" political parties are even benefited by the ceiling of fifty percent imposed on any one party, thus allowing a party whose candidate received a small percentage of the gubernatorial vote to receive that percentage of "undesignated" funds together with a pro-rata share of the over-fifty percent funds which otherwise would have been available to the party whose candidate amassed more than fifty percent of the vote for governor, plus an absolutely equal distribution of the ten percent "reserved" funds which have not been "designated."

Comparing the Idaho scheme for distribution of "designated" fund monies with the basic scheme for distribution funding in Texas, it is clear that the Texas provisions appear manifestly "unfair" by Idaho standards. Yet, the Texas scheme was approved by this Court. It will be noted that *only* the "major" political parties, which receive more than twenty percent of the vote for their gubernatorial candidate at the last election and which must, therefore, hold primary elections, receive money from the State of Texas. Yet, political realities dictate that the political conventions *required* of other political parties in Texas are expensive to conduct. Texas, however, provides no funding whatsoever for these conventions, even though the parties holding the same may have fielded candidates who polled up to twenty percent of the Texas gubernatorial vote. Certainly, it is true that such political conventions do not receive the same voter attention, awareness, and concern that are an inherent part of a primary election process. In a primary election, political parties spend many hours and, often, many thousands of dollars in bringing their candidates to the attention of the electorate.

Such name identification and candidate awareness create an advantage for those candidates participating in the primary election process which is *denied* by Texas law to those political parties which *must* nominate by convention. Yet, *only* the political parties conducting primary elections receive reimbursement for three-fourths of their expenditures. Idaho's funding and distributional scheme is, on its face, as well as in practice, inherently more equitable than the Texas scheme sanctioned by this Court. It must, therefore, follow that in Idaho the Fourteenth Amendment's equal protection clause is well served by the distribution plan adopted by the Idaho Legislature in §34-2503(b), *Idaho Code*.

CONCLUSION

For the above and foregoing reasons, and in light of the above authority, it is respectfully submitted that this appeal be dismissed or that the decision of the three-judge Court below be affirmed.

DATED this 9th day of February, 1977.

Respectfully submitted,

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Peter E. Heiser Jr., Chief Deputy Attorney General of Idaho, being first duly sworn, deposes and certifies that on this 9th day of February, 1977, two copies of the Motion to Dismiss or Affirm, by the State of Idaho were mailed, postage prepaid, to Counsel for the Appellants at the following addresses.

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I further certify that all parties required to be served have been served.

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Subscribed and sworn to before me this 9th day of February, 1977.

/s/ Lois W. Hurless

Notary Public for Idaho
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NOTARY